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No. 83-991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA
and TAPOCO, INC.,

Petitioners,

v.

UTILITIES COMMISSION OF THE STATE OF
NORTH CAROLINA, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Fourth Circuit**

BRIEF OF THE UTILITIES COMMISSION OF THE STATE OF NORTH CAROLINA, *et al.* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Federal District Court correctly abstain from setting aside an order of the North Carolina Utilities Commission setting intrastate, retail electric rates at a time when said orders were on appeal to and stayed by a North Carolina appellate court?

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STATEMENT OF THE CASE

In this case, Aluminum Company of America ("Alcoa") and one of its wholly-owned subsidiaries, Tapoco, Inc. ("Tapoco"), seek to set aside certain orders of the North Carolina Utilities Commission ("NCUC"). *These orders were issued by the NCUC in a proceeding on remand from the Supreme Court of North Carolina, have been affirmed by the North Carolina Court of Appeals and are currently on appeal to, and stayed by, the Supreme Court of North Carolina.*

The orders which Alcoa and Tapoco seek to enjoin set *intrastate*, retail electric rates to be charged to North Carolina consumers by another of Alcoa's wholly-owned subsidiaries, Nantahala Power & Light Company ("Nantahala"). Neither Nantahala, whose rates were set by the orders in question, nor its customers, who will pay the higher rates if the orders are set aside, are parties to this federal proceeding. They are, however, parties to the pending state proceedings.

A. State Judicial Proceedings

On November 1, 1976, Nantahala applied to the NCUC for authority to increase its North Carolina retail rates. The NCUC set the application for public hearing, and a number of Nantahala's customers and their representatives intervened in the proceedings.

During the hearings, the intervenors requested the Commission to join as parties Alcoa and Tapoco and to compel Nantahala to produce information which would allow the NCUC to consider a rate design based on the "rolling in" of Tapoco's properties, revenues and expenses with those of Nantahala, in consideration of the fact that the transmission facilities of the two utilities are integrated and interconnected into a single system. Both motions were denied, and Nantahala was granted an increase in its North Carolina retail sales.

On appeal, the North Carolina Court of Appeals reversed and remanded the case to the NCUC with instructions to consider use of a roll-in method of rate-making involving Nantahala and Tapoco. *Utilities Commission* v. *Edmisten*, 40 N.C.App. 109, 120, 252 S.E.2d 516, 522 (1979), *aff'd in part, rev'd in part*, 299 N.C. 432, 263 S.E.2d 583 (1980). Nantahala appealed the decision of the

North Carolina Court of Appeals to the Supreme Court of North Carolina.

The North Carolina Supreme Court in a unanimous decision observed that "[t]he transmission facilities of Nantahala and Tapoco are integrated and interconnected into a single system" and that "Alcoa controls the ultimate operation and accounting policies of both utilities." *Utilities Commission* v. *Edmisten*, 299 N.C. 432, 435, 263 S.E.2d 583, 586 (1980). The Court therefore remanded the case to the NCUC with instructions that it consider the expenses of this integrated system when fixing rates for Nantahala. 299 N.C. at 443, 263 S.E.2d at 591.

Despite its remand, the North Carolina Supreme Court permitted Nantahala to continue to charge the increased rates approved by the NCUC "conditioned upon Nantahala's guarantee that it will in the future refund to its customers any overcharges should the new rates ultimately be determined excessive." 299 N.C. at 443, 263 S.E.2d at 592. Nantahala provided this guarantee by the filing of an "Undertaking to Refund" in which it agreed to refund in a manner to be prescribed by the Commission "the amount, if any, found to be owing to its customers should the rates approved by the order of 14 June 1977 be ultimately determined to be excessive after hearing on remand from the Supreme Court." In that Undertaking to Refund, Nantahala also declared "itself to be financially able to discharge the obligation set forth in its Undertaking to Refund . . . ."

On remand to the NCUC, Alcoa and Tapoco were made parties to the proceedings. After the hearing, the NCUC issued an order (the "September 2, 1981 Order") setting North Carolina retail rates for Nantahala, requiring Nantahala to make certain refunds pursuant to its Undertaking to Refund and ordering Alcoa to make the refunds

required in the event Nantahala was not able to comply with the requirements of its Undertaking to Refund.

Nantahala, Alcoa and Tapoco petitioned the NCUC to reconsider the September 2 Order. On January 28, 1981, the NCUC issued an order affirming the September 2 Order. (The September 2 Order and the January 28 Order are hereinafter referred to collectively as the "Rate Orders.")

The Rate Orders were appealed to and affirmed by the North Carolina Court of Appeals on December 6, 1983. The Rate Orders were subsequently appealed to, *and stayed by*, the North Carolina Supreme Court, and that court will decide the legality of those orders. In that state court proceeding, unlike this federal court proceeding, all relevant parties, including Nantahala and its customers, are represented.

B. Federal Court Proceedings

Alcoa and Tapoco, *but not Nantahala*, filed a Complaint in the United States District Court for the Eastern District of Tennessee on January 26, 1982, seeking to set aside the NCUC's September 2 Order. At the time of the filing of the Federal Complaint, the September 2 Order was on appeal to the North Carolina Court of Appeals.

While the case was pending before the Tennessee Court, the NCUC filed a Motion to Dismiss and Alternative Motion for Change of Venue. On April 12, 1982, the Tennessee Court transferred this case to the United States District Court for the Eastern District of North Carolina but did not rule on the Defendants' Motion to Dismiss.

On July 29, 1982, the United States District Court for the Eastern District of North Carolina granted the

NCUC's Motion to Dismiss on abstention grounds. (Appendix, p. 17a) The District Court decision was unanimously affirmed by the Fourth Circuit. The opinion of the Fourth Circuit (Appendix, p. 1a) is reported at 713 F.2d 1024. The petition for rehearing filed by Alcoa and Tapoco was denied, "no judge having requested a poll on the suggestion for rehearing en banc." (Appendix, p. 15a, 16a)

ARGUMENT

Alcoa and Tapoco assert that the Fourth Circuit's decision is "an unprecedented expansion of the abstention doctrine." (Petition, p. 9) Contrary to this hyperbole, the Fourth Circuit's decision is based upon a long-line of judicial precedent holding that federal District Courts should abstain from enjoining orders of state utilities commissions where, as in this case, adequate remedies are available in the state courts.

A. *The Abstention Doctrine Arose Out Of, And Is Particularly Applicable To, Utility Rate Proceedings.*

As pointed out by Petitioners Alcoa and Tapoco, there are "three variants of the abstention doctrine." (Petition, p. 10) It is significant that two of these "variants" originated in the context of state utility commission cases. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

Both the District Court and the Fourth Circuit found that *Burford* abstention was applicable to the facts of this case.[1] Considering the similarities of the two cases, no

[1] The District Court also found that the third "variant" of the abstention doctrine as set forth in *Younger* v. *Harris*, 401 U.S. 37 (1971) was applicable. (Appendix, p. 27a-28a) The Fourth Circuit, while noting the probable applicability of *Younger* abstention, stated

other conclusion could reasonably have been reached. In *Burford*, the court held that abstention was proper with respect to a challenge to a Texas state commission's oil field proration order. The Court reasoned:

> These questions of regulation of the industry by the State administrative agency . . . so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them . . . . The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

319 U.S. at 332-334.

The similarities between the instant case and *Burford* are compelling:

1. At issue in both cases is an order of a state utilities commission.

2. In both cases, the state courts "can give fully as great relief, including temporary restraining orders."[2]

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that it need not decide that question due to the applicability of *Burford* abstention. (713 F.2d 1024, 1029; Appendix, p. 11a, fn. 2). The Fourth Circuit also noted that *Pullman* abstention "may be called for here." (713 F.2d 1024, 1029; Appendix, p. 11a, fn. 3).

[2] Indeed the challenged Rate Orders are presently stayed by order of the North Carolina Supreme Court.

3. In both cases, the judicial review of the orders in the state courts is expeditious and adequate.[3]

4. In both cases, review of a commission order is limited to a single court to provide uniform adjudication of a complex state regulatory scheme.[4]

5. In both cases, needless conflict between state and federal courts can be avoided by abstention.[5]

Thus, the Fourth Circuit in this case, like many other courts before it, simply recognized that federal courts should not intervene in an ongoing state utility case. *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341 (1951); *Tennyson* v. *Gas Service Company*, 506 F.2d 1135, 1143 (10th Cir. 1974); *City of Monroe* v. *United Gas Corp.*, 253 F.2d 377, 381 (5th Cir. 1958); *General Investment & Service Corp.* v. *Wichita Water Co.*, 236 F.2d 464, 468 (10th Cir. 1956); *General*

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[3] The challenged Rate Orders have already been affirmed by the North Carolina Court of Appeals and are presently on appeal to the North Carolina Supreme Court.

[4] The Fourth Circuit found that the setting of Nantahala's intrastate retail rates "involved important and basic considerations of state policy and was accomplished in accordance with the uniform procedures for the formation of that policy." 713 F.2d at 1029; Appendix, p. 10a.

[5] It should be noted that the challenged Rate Orders were issued in a proceeding on specific remand by the North Carolina Supreme Court. In *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 608 (1975), this Court admonished federal courts to avoid intervention where state proceedings have reached an advanced stage:

> Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. Nor . . . is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important.

Telephone Co. of the Southwest v. *Robinson*, 132 F.Supp. 39, 46 (E.D. Ark. 1955); *Klontz* v. *Consolidated Edison Co. of N.Y.*, 386 F.Supp. 577, 585 (S.D.N.Y. 1974); *Davis* v. *City of Little Rock*, 136 F.Supp. 725, 728-29 (E.D. Ark. 1955); *Jeffrey* v. *Southwestern Bell*, 372 F.Supp. 979, 981 (N.D. Tex. 1974).

B. *Allegations Of Federal Preemption Do Not Prevent Application Of The Abstention Doctrine, Particularly When The Claimed Federal Preemption Arises By Way Of Defense To State Claims*

Alcoa and Tapoco argue here, as they did before the District Court and the Fourth Circuit, that the challenged Rate Orders are preempted by federal law and that abstention never applies where federal preemption is claimed. (Petition, p. 10-13). Alcoa and Tapoco are incorrect on both counts.

First, the challenged Rate Orders merely set Nantahala's *intrastate* retail rates. In so doing, they were not bound to follow the same allocation method used by the Federal Energy Regulatory Commission when it set Nantahala's *interstate* rates. *Central Kansas Power Co.* v. *State Corporation Commission*, 221 Kan. 505, 561 P.2d 779, 791 (1977).

Second, contrary to the assertion of Alcoa and Tapoco, the mere claim of federal preemption does not *per se* permit a complainant to avoid the consequences of abstention. A case directly on point is *Allegheny Airlines* v. *Pennsylvania Pub. Util. Com'n*, 465 F.2d 237 (3rd Cir. 1972), *cert. denied*, 410 U.S. 943 (1973). In that case an interstate airline brought an action in federal court to enjoin certain orders and rules of the Pennsylvania Public Service Commission pertaining to air service between Pennsylvania cities. The airline contended that the orders and rules constituted an unlawful intrusion upon

an area preempted by federal law. The District Court noted that the proceedings instituted by the commission raised only questions of state law, that the federal questions would enter the picture only by way of defense of the action of the commission, and that a federal court's jurisdiction may not be predicated upon federal question defenses to the state proceedings. 310 F.Supp. 407, 411 (E.D. Penn. 1970). The District Court went on to hold that although it had diversity jurisdiction, it would abstain from exercising that jurisdiction to avoid interferring with on-going state proceedings. 319 F.Supp. at 412-414. The complaint was dismissed. On appeal, the Third Circuit affirmed, and this Court denied certiorari. *See in accord, California* v. *Oronville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969).

In the instant case, both the District Court and a unanimous panel of the Fourth Circuit determined that Alcoa and Tapoco had failed to allege facts to show the existence of federal preemption of the type that might enable them to avoid abstention. This is hardly surprising since, as recognized by the Fourth Circuit, "[t]he NCUC order on its face sets only retail, intrastate rates, an important matter traditionally within the sole discretion of the states, and does not directly conflict with FERC's wholesale and interstate rate setting power." 713 F.2d at 1030, Appendix, p. 12a.

C. *No Conflict Between The Circuits Exists As To Whether The Federal Courts Should Abstain In Preemption Cases*

Alcoa and Tapoco contend that a conflict exists between the Second Circuit, the Third Circuit and the Ninth Circuit, on the one hand, and the Fourth Circuit, on the other hand, as to whether abstention can properly be invoked to dismiss preemption claims. (Petition, pp. 19-

20) This contention, however, is repudiated in their own Petition.

Alcoa and Tapoco recognize that "the rules governing the application of the abstention doctrine" have been developed on a "case-by-case basis." (Petition, p. 9) Since the application of the abstention doctrine depends upon the facts of each case, the applicable rules could not have been developed any other way.

Precisely because the applicability of the abstention doctrine to cases in which preemption is alleged is dependent upon the particular facts of each case, the Eleventh Circuit has observed (in a case Petitioner cites at Petition, p. 19, fn. 14) "[i]t would be an overstatement to suggest that when the question is one of preemption, abstention . . . is never appropriate." *Baggett* v. *Dept. of Professional Regulations*, 717 F.2d 521, 524 (11th Cir. 1983).

The same point is also illustrated by the decisions of both the Third and Ninth Circuits. Citing *Hotel & Res. Emp. & Bar. Int. Union 54* v. *Danzinger*, 709 F.2d 815 (3rd Cir.), probable jurisdiction noted, sub nom., *Brown* v. *Hotel & Res., etc.*, ____ U.S. ____ (Case Nos. 83-498 and 83-573, Nov. 28, 1983) and *Knudson Corp.* v. *Nevada State Dairy Comm.*, 676 F.2d 374 (9th Cir. 1982), Alcoa and Tapoco contend that abstention does not apply when preemption is alleged. Petition, p. 10-13. In fact, both Circuits, based on other facts, have applied *Burford* abstention despite claims of preemption. *Allegheny Airlines* v. *Pennsylvania Pub. Util. Com'n.*, *supra*, and *California* v. *Oronville-Wyandotte Irrigation District*, *supra*.

In the *Hotel* case relied on by Alcoa and Tapoco, the Court gave the following three reasons for not applying *Burford* abstention to the facts of that case: (1) the ques-

tions of state law were neither technical nor complex, (2) no argument need be made based on disruption of a state administrative scheme and (3) the state agency lacked authority to entertain the preemption challenge. 709 F.2d at 832. None of these reasons apply in the instant case where the NCUC was setting intrastate electric rates pursuant to a complex state administrative claim and where the claimed preemption is currently pending before the North Carolina Supreme Court which unquestionably has jurisdiction to rule on that claim. In any event, the cases cited by Alcoa and Tapoca do not illustrate a split among the circuits, they simply illustrate that application of *Burford* abstention depends on the facts of each case, a point clearly recognized by the Fourth Circuit. 713 F.2d at 1030; Appendix, p. 12a.

CONCLUSION

In this action, Alcoa and Tapoco are seeking to set aside orders of the NCUC setting rates for a North Carolina utility to charge its North Carolina customers. The orders have been appealed to, and stayed by, the North Carolina Supreme Court which will decide the legality of those orders. If Alcoa and Tapoco are dissatisfied with that decision, they, of course, can seek review by this Court afterwards. The District Court and the Fourth Circuit thus properly abstained from interferring in these on-going state appellate proceedings in accordance with

long-established judicial precedent. The petition for writ of certiorari should be denied.

Respectfully submitted, this the 20th day of January, 1984.

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